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JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1884.

NO. 963.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, *Plaintiff in error.*

vs.

THE IOWA HOMESTEAD COMPANY, *Defendant in Error.*

Reply to Plaintiff's Argument on Motion to Dismiss Writ of Error.

C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF.

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I.

The first ground on which plaintiff in error claims jurisdiction for this court is that the state court held that the decision in the Wolcott and Burr cases 5 Wall. 581, was not such a final determination of the rights of the Homestead company to the so called Des Moines River lands as to cause the statute of limitation to begin to operate at that date. This simply raised a question as the proper construction of the statute of limitation of the state of Iowa. To apply the bar of this statute the court was required to determine how and at what time the cause of action accrued. In deciding this question the state court decided a matter of purely local and not of the federal cognizance.

It is true that a refusal by a state court to *give effect* to a federal judgment, raises a federal question. But the only effect of the judgments in the Wolcott and Burr cases was to settle the title to the lands involved in those cases. The Homestead company never had or even claimed to have any interest in those suits or in the lands in controversy therein. Hence there can be no pretense that full and complete effect was not given to the judgments in those cases. In the case at bar the state court was in no sense called upon to give effect to said judgments and hence a refusal to give effect to them was not in any manner possible. The question presented for the determination of the state court was whether the cause of action accrued when the decision in the Wolcott and Burr cases was rendered or when the opinion of this court was delivered in the Iowa Homestead suit which was the termination of all *bona fide* litigation about the title to the lands. When a cause of action accrues under the statutes of Iowa, or when the statute of limitation begins to run is necessarily a question for the determination of the state and not of the federal courts.

II.

The second ground on which jurisdiction is claimed in this suit is the defense of former adjudication. That this defense was abandoned both *actually* and *constructively* can admit of no shadow of doubt.

To entitle the plaintiff in error to a decision on this question it was necessary

First. To set the matter out in his pleadings as a defense.

Second. To assign the action of the lower court therein as an error.

Third. To argue or discuss the point thus assigned as error in the appellate court.

To neglect either one of these steps under the rules of practice of the courts of Iowa is necessarily an abandonment of the alleged defense. To fail to discuss or argue the question for the assistance and enlightenment of the court is just as fatal and just as decisive against the negligent party as the omission to

plead such defense. In this case the state court refused to consider the question of former adjudication, *expressly and distinctly* upon the ground that the question was not discussed in argument.

That it was not in fact discussed orally we know with the same absolute certainty, that we know that we were present in the court. We went there with the deliberate and oft considered purpose not to argue it orally, because the counsel on the other side had omitted it in his printed brief. If the adverse counsel argued it, he did it in violation of the rules of the court and in defiance of our best efforts to hear and prevent him.

The defense of former adjudication was deliberately abandoned for the reason that it had no real foundation in law.

The judgment of this court in the said case of the Iowa Homestead com'y against the Des Moines Navigation & R. R. company set forth as a defense to this action *was absolutely void.* This court had no jurisdiction of that case except by virtue of the citizenship of the parties; and *the record itself* showed that the plaintiff and defendant were citizens of the same state. Notwithstanding this fact this court was *duped* purposely or otherwise, into delivering an opinion in a suit in which it had no shadow of jurisdiction. It is not necessary now to state how this court was decoyed from the record and induced to deliver an opinion in that case. The matter is referred to merely to explain why the defense of former adjudication was deliberately abandoned. The abandonment was made because it was well known the judgment of this court was void for want of jurisdiction on the part of the court to render it. The failure to discuss the point in the printed argument was and ought to be conclusive against the right of the plaintiff in error, to have the subject considered by the state court. It, *in fact* induced the counsel for the defendant in error not to prepare and file a printed reply. The rule of the state court forbidding such unfair practice or trickery, is founded upon justice and good sense. If the plaintiff in error desired to have the decision of the state court upon the question, all he had to do was to discuss it in his printed brief. He knew he had no right to argue it orally, unless he presented it in his printed argument.